Petition

81-1853

Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

SPUDNIK EQUIPMENT COMPANY,
Petitioner,

v.

SIXTA GARZA, Individually, as Representative of the Estate of MIGUEL G. GARZA, Deceased; ISRAEL GARZA, ESMERALDA GARZA GALLARDO, ISMAEL GARZA, AND DAVID LEONEL GARZA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Spudnik Equipment Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on November 27, 1981.

QUESTIONS PRESENTED FOR REVIEW

1. Can the Court of Appeals reverse for error without examining independent trial court findings which are determinative?

   (a) Does such a procedure violate Rules 52(a) and 61, F.R.C.P.?

   (b) Does such a procedure violate due process?

2. Did the Court of Appeals grossly misapprehend or misapply Rules 52(a) and 61, F.R.C.P., by failing to examine independent trial court findings which are determinative?

3. Whether the Court of Appeals has rendered a decision in conflict with the decision of another federal court of appeals.

4. Whether the Court of Appeals has rendered a decision on a matter of Texas law in conflict with a decision of a Texas Court.

5. Whether the District Court is bound to credit Speculative Opinion Testimony.

LIST OF ALL PARTIES

All parties are reflected in the caption. There are no corporations related to Petitioner Spudnik Equipment Company.

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41 Minn. L.Rev. 751 (1957), Charles Alan Wright, "The Doubtful Omniscience of Appellate Courts" 15
65 The Yale Law Journal 482, Leon Green (1956), "Jury Trial and Mr. Justice Black" 16

OPINIONS BELOW

The opinion of the United States Court of Appeals for Ninth Circuit is unreported, and is printed in Appendix A hereto, infra, page 1. The order of the Court of Appeals denying Appellant's petition for rehearing is printed in Appendix A hereto, infra, page 12. The judgment of the United States District Court for the District of Idaho is printed in Appendix A heroto, infra, page 5. Its findings of fact and conclusions of law are printed in Appendix A, infra, page 6, and an order amending those findings of fact is printed in Appendix A, page 10.

JURISDICTION

The judgment of the United States Court of Appeals (Appendix A, infra, page 11) for the Ninth Circuit was entered on November 27, 1981, and was served on defendant by mail. A timely petition for rehearing was filed on December 11, 1981, which was denied on January 6, 1982. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES OF CIVIL PROCEDURE

The Fifth Amendment to the United States Constitution provides:

> "No person shall ... be deprived of ... property without due process of law ..."

Rule 52(a), FRCP, provides:

> "In all actions tried upon the facts without a jury ... the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 ... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses ..."

Rule 61, F.R.C.P., further declares:

> "Harmless Error ... The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF CASE

This is a wrongful death action under the substantive law of Texas. Miguel Garza died in Texas on April 28, 1974, when a potato piler manufactured by defendant overturned and fell on him. R. p. 23 L. 18, 20, par. 11.

Jurisdiction in the District Court was based on diversity of citizenship, under 28 U.S.C. sec. 1332. Plaintiffs are citizens of Texas. Defendant Spudnik Equipment Company is a citizen of Idaho.

The suit was based on strict liability in tort. Trial was to the Court. The District Court made detailed findings of fact and conclusions of law, pursuant to which judgment was

entered in favor of the defendant.

The Court of Appeals reversed, holding that,

> "... it was reasonably forseeable that the piler would be operated without outriggers unless the operator was warned against such use. The District Court's finding to the contrary is clearly erroneous ... Spudnik had a duty to warn ... Under Texas Law ... there is a rebuttable presumption that if an adequate warning had been give, a user 'would have read any warning provided by the manufacturer, and acted to minimize the risks ...' Spudnik offered no evidence to rebut that presumption ... Thus the evidence clearly establishes that had a warning against operation of the piler without outriggers been placed on the machine itself, Garza would have read and heeded such a warning and used outriggers at the time of the accident, thereby avoiding injury. We therefore conclude that the district court's finding that the evidence is insufficient to establish that a warning would have reached decedent Garza or prevented the accident in question is clearly erroneous ... Because an adequate warning would have prevented the accident, we further conclude that the failure to warn was the producing cause of decedent Garza's death."

The Court of Appeals further noted that,

> "... An expert witness called by Spudnik testified on cross-examination that the mishap would not have occurred had the piler been operated with outriggers."

In Finding of Fact No. 20 the District Court found:

> "That the evidence is insufficient to determine by a preponderance of the evidence how the accident happened or the actual cause of the accident."

That finding was supported by substantial evidence, and the Court of Appeals made no finding to the contrary. Monico Huerta was the only witness to the accident produced at trial. Tr. pp. 357, 358. Huerta testified there was no load on the boom or piler when the accident occurred. Huerta, 1st Deposition, p. 6, admitted in evidence.

Carl Hobbs and Dr. Norval Wardle (a civil engineer and an expert on farm machine stability, Tr. pp. 415-418) both testified that the piler could not have tipped over under the conditions testified to by Huerta. Tr. pp. 317, 318, 320, 321, 323, 339-343, 345, 347, 348, 350, 351, 353, 354, 357, 358, 422, 423-430, 432-442, 463, 490-493. Their testimony was fully corroborated with a stability demonstration of the piler recorded on video tape, admitted into evidence as Exhibit 3.

Hobbs' and Wardle's testimony, as well as the video tape, clearly show that the piler will not tip over on a reasonably level surface without a load on the boom, even without the outriggers on. Tr. pp. 425-427. For the machine to tip over in the fashion testified to by Huerta would require some force not shown in the evidence. Tr. pp. 435, 436, 439, 440, 463.

The District Court therefore entered the following Conclusions of Law:

> "4. Even if defendant had been under a duty to warn against operation of the piler without the

> outriggers, the evidence was insufficient to establish that ... the failure to warn was the producing cause of Miguel Garza's death."
>
> "5. The plaintiffs have failed to establish by a preponderance of the evidence any right to recover against the defendant."

The trial court obviously did not believe all of Huerta's testimony, and, as the trier of the facts, found that the plaintiffs failed to prove the actual cause of the accident. The Court of Appeals' decision completely ignored that finding. Its decision does not even mention Fact Finding No. 20, which is so critical to an understanding of this case.

The district court also made the following findings of fact:

> "18. ... Mr. Garza had been a night foreman at the Vahlsing plant and had occasion to see the potato piler in operation, without outriggers.
>
> 19. That someone who had operated a Spudnik Swing Boom Piler Model 400, or had seen such a machine in operation would be aware that rotation of the boom without attached outriggers would create some tipping action and that, absent cautious operation of the machine, such tipping action could conceivably result in the overturning of the machine."

And the Court of Appeals made no findings to the contrary. Richmond Deposition (admitted into evidence), pp. 6, 8, 19.

"Tipping action" occurs when the boom is rotated. The tipping action that takes place when the boom is rotated is gradual, **and can be seen and felt by the operator.** Tr. p. 344. When tipping action occurs, it is **quite noticeable.** Tr. p. 353, 397. Furthermore, the boom can be rotated through ten to fifteen degrees from the point at which tipping action begins, before the machine will tip over (assuming there

were a load on the boom). Tr. p. 353. Dr. Wardle testified that the machine's tipping action is sufficiently noticeable that the operator can tell when it is taking place, Tr. pp. 442-444, and the operator,

> "... would surely have an appreciation of this problem" (Tr. p. 445)

The tipping action becomes noticeable to the operator at around fifteen to twenty degrees from straight ahead, Tr. p. 456, which would be at least fifteen degrees before it would tip over, even under Flanagan's (expert for plaintiffs) testimony. Since each turn of the crank moves the boom about 1.21 degrees, that fifteen degrees would require over twelve revolutions of the hand crank. Tr. 340, 349, 350.

There was thus much substantial evidence that the danger was obvious, and there was substantial evidence to believe that the piler could not have turned over in the manner testified to by Huerta, and there was therefore good reason not to credit Huerta's testimony.

REASONS FOR GRANTING WRIT

I.

IT IS A GROSS VIOLATION OF RULES 52(a), 61, F.R.C.P., AND DUE PROCESS TO REVERSE WITHOUT EXAMINING INDEPENDENT BASES FOR A DECISION

This case involves much more than sufficiency of the evidence. The issue here is whether the Court of Appeals has a duty to examine alternative findings of fact which independently support the judgment, before reversing for error. Defendant-Petitioner submits that it is arbitrary not to do so, and a violation of Rules 52(a) and 61 F.R.C.P., as well as due process, not to do so.

The trial court made a finding of fact that plaintiff had failed to prove actual cause of the tipping and accident. This was based on conflicting evidence, and there is certainly substantial evidence in the record to support the trial Court's finding. The decision of the Court of Appeals is thus not only erroneous, but so flagrantly ignores (and even fails to discuss) the aforementioned fact finding, as to bring into

serious question the role of the trial court and the appellate court in determing fact issues. Traditionally in our legal system, the trial court or jury is given great deference in determing fact issues, as the appellate court has no opportunity to view the demeanor of the witnesses, nor to weigh the evidence, and determine the truthfulness of the witnesses. A refusal to credit testimony cannot be considered as clearly erroneous. The determination of credibility is for the trial court. **Guzman v. Pichirilo**, 369 U.S. 698, 701-703, 3 L.Ed.2d 205, 207, 209, 210 (1962).

Where trial has been by a judge without a jury, his finding's of fact must stand unless clearly erroneous. Rule 52a. F.R.C.P. This rule applies also to factual inferences from the basic facts. **Commissioner v. Duberstein**, 363 U.S. 278, 290, 291, 4 L.Ed.2d 1218, 1228, 80 S.Ct. 1190 (1960). A Court of Appeals has no power to weigh evidence and make its own findings of fact. **McCaughn v. Real Estate Land, Title & T. Co.**, 297 U.S. 606-608, 80 L.Ed. 879-881, (1935). In **McCaughn** a jury was waived, and trial was to the Court in an action to recover estate taxes paid. The trial court found:

> " '... the plaintiffs have failed to show that the motive for this transfer ... was not of the sort which leads to testamentary disposition, and consequently have failed to meet the burden of proof placed upon them ...' "

The Court of Appeals reviewed the evidence, concluded that the transfer was not made in contemplation of death, and reversed the judgment. The Supreme Court reversed, and reinstated the trial court's decision, holding:

> "The instant case is controlled by the established rules relating to appellate review in actions at law where a jury trial has been waived. ... Where a general verdict is found by the trial court, it has the same effect as the verdict of a jury. The appellate court cannot pass upon the weight of evidence. ... plaintiffs' exceptions to

> the conclusions of law of the trial court, and to the refusal of the court to reach other conclusions as requested, raised no question save the one of law, whether the court's verdict was wholly without evidence to sustain it. That question does not appear to be substantial. the ultimate question for the decision of the trial court was one of fact and its general verdict was conclusive. The Circuit Court of Appeals was without authority to weigh the evidence and to make its own findings."

Here also the trial court found on conflicting evidence that the plaintiffs failed to carry their burden of proof, and found the evidence insufficient to establish the cause of the accident. The trial court further found that the danger of tipping was obvious. The Court of Appeals reviewed the evidence and reversed, holding that the defendant breached its duty to warn. Defendant does not on this appeal dispute whether it breached a duty to warn. But, as the trial court so lucidly concluded, in Conclusion of Law No. 4, the plaintiffs were still required to prove the cause of the accident, and they failed to do that. The Court of Appeals completely ignored the District Court's Finding of Fact No. 20,

> "That the evidence is insufficient to determine ... how the accident happened or the actual cause of the accident."

To do so was erroneous under Rule 52(a), F.R.C.P., and a gross violation of established judicial procedure. **Guzman v. Pichirilo, supra 369 U.S. 698;** a decision to credit or not credit testimony cannot be considered clearly erroneous. The determination of credibility is for the fact finder, be it judge or jury. **McCaughn v. Real Estate Land, Title & T. Co.,** supra, 297 U.S. at 608; **Dick v. New York Life Ins. Co.,** 359 U.S. 437, 444-447, 3 L.Ed.2d 935, 941, 942, 79 S.Ct. 921 (1959) (Diversity jury case was reversed by Court of Appeals for insufficient evidence. Supreme Court reversed); **Texas Gas Trans. Corp. v. Shell Oil**

Co., 363 U.S. 263, 268, 4 L.Ed.2d 1208, 1212, 80 S.Ct. 1122 (1960) (Held: Court of Appeals exceeded appropriate scope of judicial review); **Webb v. Illinois C.R. Co.**, 352 U.S. 512, 1 L.Ed.2d 503, 77 S.Ct. 451 (1957) (Court of Appeals reversed FELA case for insufficient evidence of negligence to go to jury. Supreme Court reversed); **Graver Tank Co. v. Linde Air Prod. Co.**, 339 U.S. 605, 609-612, 94 L.Ed. 1097, 1103-1104 (1949); **McAllister v. United States**, 348 U.S. 19-21, 23, 99 L.Ed. 20, 24-26, 75 S.Ct. 6 (1954). **Gallick v. Baltimore & Ohio R.G.**, 372 U.S. 108, 9 L.Ed.2d 618, 83 S.Ct. 659 (1963).

In the diversity case of **Dick v. New York Life Ins. Co.**, supra, 359 U.S. at 4[illegible]4-4447, the Court held:

> "The Court of Appeals ... stated that "[o]ne can believe that even an experienced hunter might accidentally shoot himself once, but the asserted theory that he could accidentally shoot himself first with one barrel and then with the other stretches credulity beyond the breaking point." ...
>
> ... the Court of Appeals ... committed its basic error in resolving a factual dispute in favor or respondent ...
>
> ... the district judge, who was intimately concerned with the trial and who has a first-hand knowledge of the applicable state principles, believed that the case should go to the jury. Under all the cirucumstances, we believe that he was correct and that reasonable men could conclude that the respondent failed to satisfy its burden of showing that death resulted from suicide.
>
> Reversed."

The Court's reasoning in **Graver Tank Co. v. Linde Air Prod. Co.**,

supra, 339 U.S. at 609-611, is also applicable:

> ... Proof can be made in any form through testimony of experts or others versed in the technology; by documents, including texts and treatises; and, of course, by the diclosures of the prior art. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. Particularly is this so in a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience. ...
>
> It is not for this Court to even essay an independent evaluation of this evidence. This is the function of the trial court. And, as we have heretofore observed, "To no type of case is this . . . more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations. ... the trial judge. ... viewed motion pictures of various welding operations and tests and heard many experts and other witness."

That is exactly the situation here. This was a Court tried case. The Seventh Amendment to the Constitution precludes reexamination on appeal of facts decided by a jury. Rule 52(a), F.R.C.P., was designed to give the same scope of judicial review in law cases tried to the Court, as in jury trials. **Lundgren v. Freeman**, 307 F.2d 104, 114 (9th Cir. 1962). In **Prendergrass v. New York Life Ins. Co.**, 181 F.2d 136 (8th Cir. 1950), the Court astutely observed,

> "... The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is ... detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases."

To the same effect, see **Handbook of the Law of Federal Courts**, Charles Alan Wright, 3rd ed. (1976), p. 480, sec. 96; 41 Minn. L.Rev. 751 (1957), Charles Alan Wright, "The Doubtful Omniscience of Appellate Courts". Professor Wright in this latter article, states:

> "For a good many years my colleague, Leon Green, has been pointing out that:
>
> Probably the strangest chapter in American legal history is how in the short period of the last fifty or seventy-five years, the same period during which trial courts were losing most of their power, the appellate courts have drawn unto themselves practically all the power of the judicial system.
>
> In a recent statement of his views Dean Green has observed, with much justification:
>
> The trial judge is not much more than a trial examiner, while the jury simply satisfies the public and professional craving for ceremonial -- the necessity for dealing with simple matters as though they were freighted with great significance.

> The principal means by which appellate courts have obtained such complete control of litigation has been the transmutation of specific circumstances into questions of law. Subtle rules about presumptions and burden of proof, elaborate concepts of causation and consideration and the rest, have been devised in such a way that unless the appellate judge handling the case is a dullard, some doctrine is always at hand to achieve the ends of justice, as they appear to the appellate court.
>
> Dean Green's analysis seems to me unanswerable. The purpose of the present article is to call attention to certain recent developments which add further support to his thesis. Within the last decade the appellate judges have become bolder. No longer do they hide their assumption of power beneath an elaborate doctrinal superstructure. Instead today's appellate courts are inventing new procedural devices by which their mastery of the litigation process can be made direct rather than devious."

See also 65 The Yale Law Journal 482, Leon Green (1956), "Jury Trial and Mr. Justice Black."

The District Court found that the plaintiffs failed to prove the cause of the accident, and that the danger was obvious. (See argument, infra, on applicable substantive law). Therefore, if the District Court erred, as the Court of Appeals held, in finding no duty to warn, the error was harmless, under Rule 61, F.R.C.P.

This point was made in defendant's brief filed in the Court of Appeals, but that Court did not even discuss the point in its decision. The Court of Appeals so completely ignored those findings of fact, that they are not even mentioned in the Court of Appeal's decision. The procedure followed by the Court of Appeals is in gross violation of Rules 52(a) and 61, F.R.C.P., as well as due process.

Intervention by the Supreme Court is called for when the Court of Appeals misapprehends or grossly misapplies the correct standard of review. **Mobil Oil Corp. v. FPC**, 417 U.S. 283, 310, 41 L.Ed.2d 72, 96, 94 S.Ct. 2328 (1974); **Universal Camera Corp. v. National L.R. Bd.**, 340 U.S. 490, 491, 95 L.Ed. 456, 469.

The Court of Appeals should be required to look at alternative findings of fact which are determinative, before reversing for error. Such an examination seems required by Rule 51(a), Rule 61, and by due process. Rule 17, Rules of the Supreme Court authorizes review on certiorari when a federal court has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision. That is applicable in this case.

II

THE DECISION IS IN PRINCIPLE IN CONFLICT WITH DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

The District Court found that the danger of tipping was obvious. There is no duty to warn in Texas if the danger is obvious. **Martinez v. Dixie Carriers, Inc.**, 529 F.2d 457, 464 (5th Cir. 1976); **Hagans v. Oliver Machinery Co.**, 576 F.2d 97 (5th Cir. 1978); "The Law of Strict Tort Liability In Texas," James B. Sales and Jim M. Perdue (1977: Houston Law Review), p. 76.

The Court of Appeals did not even discuss this issue, nor did it mention the District Court's finding that the danger was obvious. The decision in this case is inconsistent with the two Fifth Circuit decisions, both of which involved Texas law, and both of which were cited to the Court of Appeals.

III.
THE DECISION IS IN CONFLICT WITH TEXAS COURT DECISIONS

A federal court must follow substantive state law in a diversity of citizenship case. **West v. A.T. & T. Co.**, 311 U.S. 223, 231, 236, 85 L.Ed. 139, (1940); **Stoner v. New York Life Ins. Co.**, 311 U.S. 464, 465, 467, 468, 85 L.Ed. 284, (1940); **Six Companies v. Highway Dist.**, 311 U.S. 180, 188, 85 L.Ed. 114, (1940). Those decisions further hold that this rule applies to intermediate state court decisions, as well as those in the states' highest courts.

The Court of Appeals in this case held, citing **Reyes V. Wyeth Laboratories**, 498 F.2d 1264 (5th Cir. 1974), that there is a rebuttable presumption in Texas that if an adequate warning had been given, a user would have read any warning provided by the manufacturer, and acted to minimize the risk. That is correct, but that rebuttable presumption does not authorize a recovery in the absence of sufficient evidence to prove the cause of the accident, as was found by the trial court.

It is significant that **Reyes** relies on **Technical Chemical Company v. Jacobs**, 480 S.W.2d 602 (Tex. 1972), in applying the rebuttable presumption. But here the Court of Appeals uses the presumption to prove a fact not authorized by **Reyes** or **Technical Chemical Company.** The presumption simply dispenses with the need to prove that the user would have read a warning and acted to minimize the risk. But the Court went further in this case and held that the failure to warn was the producing cause of the accident. This was done without discussing the trial court's finding that the plaintiffs failed to prove the cause of the accident.

Such a failure appears to be quite arbitrary, for the District Court cited **Technical Chemical Company** in its decision, on this very issue, concluding:

> "Even if defendant had been under a duty to warn against operation of the piler without outriggers, the evidence is insufficient to establish that ... the failure to warn was the producing cause of Miguel Garza's death. **Technical Chemical Company v. Jacobs** ..."

In **Technical Chemical Company**, as here, there were credibility problems with the plaintiff's principal witness. The Texas Supreme Court specifically held that even where the rebuttable presumption applies, the plaintiff must still prove that the defect (failure to warn) was the cause of the injuries. 480 S.W.2d at 606. The Court then held:

> "The jury in this case refused to find that Technical Chemical's failure to warn was a producing cause of Jacobs' injuries, and we are unable to say that Jacobs established as a matter of law that it was a producing cause ..."

So this issue was for the fact finder. The decision in this case is inconsistent with **Technical Chemical Company**, cited by the District Court, and with **Westinghouse Electric Corp. v. Pierce**, 271 S.W.2d 422, 425, 426 (Tex. 1954). This latter case is precisely in point:

> "Plaintiff's suit was founded on the theory that this warning was inadequate to inform him of the danger in using the lamp. The warning could not, as a matter of law, have been inadequate unless a direct warning against the use of the lamp in the manner in which plaintiff used it would have prevented his injury. In other words, if the use of the lamp in the manner in which plaintiff used it did not result in injury to him, there was no duty on the defendant to warn against use in that manner and the failure to so warn could not have been a proximate cause of the plaintiff's injury. It therefore became a critical issue in plaintiff's case whether plaintiff

> was injured as a result of using the lamp in the manner in which he said he used it. His pleading and testimony was to the effect that he sustained his injury while sitting at a distance of four or five feet from the lamp for a period of about five minutes. The testimony of his expert witnesses was that he could and probably did sustain his injury from use of the lamp in that manner. He had no pleading or testimony that his injury resulted from use of the lamp in any other manner. On the other hand, the evidence offered by the defendants was directly to the contrary --that he could not and did not sustain his injury from use of the lamp in that manner. A jury finding that he did would have led to the necessity for a further finding whether the warning, above quoted, was adequate. A jury finding that he did not rendered issues on adequacy of the warning wholly immaterial."

The case at hand reaches this Court in the same posture. The trial court found, on substantial evidence, that the accident could not have happened as Huerta said it happened, just as the jury found in the above case.

In reaching its decision, the court in this case cites **Reyes v. Wyeth Laboratories**, 498 F.2d 1264, 1280, 1281 (5th Cir 1974); **General Motors Corp. v. Hopkins**, 548 S.W.2d 344, 351 (Tex. 1977); **Ethicon v. Parten**, 520 S.W.2d 527, 532, 533 (Tex. Civ. App. 1975). It is important to note that in each of those cases the Court was affirming a jury verdict in favor of the plaintiff. In each of those cases the jury, as arbiter of the facts, found causation. In none of those cases was there a reversal after the jury found there was no proof of causation. And, in fact, a thorough review of those decisions reveals some discussion of the issue of causation, and shows that this issue is for the jury or trial court to determine as the fact finder where the evidence is in conflict.

Petitioner submits that the Court has misapplied **Reyes**, and has misapprehended the Texas requirement of causation.

IV.
A TRIAL COURT IS NOT BOUND BY SPECULATIVE TESTIMONY

The Court of Appeals apparently relied on speculative testimony elicited on cross-examination from defense expert, Dr. Wardle, to establish the cause of the accident. On cross-examination, Wardle said, Tr. p. 83:

> "Q. If they hadn't taken them off, Mr. Garza would be alive today?
>
> A. That's my opinion, yes."

That testimony did not relate to a concrete fact, but was speculative and conclusory, and was not binding on the District Court. In **Anderson-Prichard Oil Corporation v. Parker**, 245 F.2d 831, 834, 835 (10th Cir. 1957), the court ruled:

> "The testimony of neither the plaintiff nor his father constituted an admission of fact which would bring it within the foregoing rule. Although they appeared to be convinced that the gas leak was through the perforations, they expressed only their opinions, which did not have the effect of a statement of fact. The facts are not peculiarly within their knowledge, but were of such nature that they could be mistaken, and are nor more conclusive than the testimony of any other witness. The evidence was not such that the court was compelled to accept it as true."

To the same effect see **Guzman v. Pichirilo, supra**, 369 U.S. 698, 701-703; **King v. Spencer**, 161 A. 103, 105, (Conn. 1932), cited in **Anderson-Prichard**; 30 Am.Jur.2d 241, 242, Evidence, sec. 1087.

The Court's reliance on such speculative opinion ignores two things: (1) The danger was obvious, which negates any duty to warn, and (2) the producing cause of this accident has not been proved, as the court so found, and as Dr. Wardle himself so testified elsewhere.

It would appear that the Court of Appeals considered the trial court to be bound by such speculative opinion testimony. This was error. A judge in a bench trial does not have to believe a witness, just as a jury does not have to believe a witness. A refusal to credit testimony cannot be considered clearly erroneous. The determination of credibility is for the fact finder. **Guzman v. Pichirilo**, supra, 369 U.S. 698, 701-703. Such error is of substantial importance to all litigants in the Federal Courts, for it utterly deprives the trial court of its legitimate role in determining he credibility of witnesses, in weighing the evidence, and in determining what inferences to draw from the facts. The idea that a party is bound by all the testimony of any witness called by that party was long ago discredited. **Rodgers v. United States**, 402 F.2d 830, 833 (9th Cir. 1968).

The Court of Appeal's refusal to allow the district Court to reject such speculative opinion testimony is a gross departure from the accepted and usual course of judicial proceedings, and calls for an exercise of this Court's power of supervision under Rule 17, Rules of the Supreme Court.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

WM. J. BRAUNER, P.A.

By Wm. J. Brauner
WM. J. BRAUNER
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Petition was mailed, postage prepaid, by first class mail, to the following:

Alberto Munoz
Flores, Sanchez, Vidaurri, Munoz & Guerra
P.O. Box 2128
McAllen, Texas 78501

Blaine Evans
Elam, Burke, Evans, Boyd & Koontz
P.O. Box 1559
Boise, Idaho 83701

Attorneys for Respondents, this 30 day of March, 1982.

Wm. J. Brauner
WM. J. BRAUNER
Attorney for Petitioner

Appendix

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIXTA GARZA, individually, as Representative of the Estate of Miguel G. Garza, Deceased; ISRAEL GARZA, ESMERALDA GARZA GALLARDO, ISMAEL GARZA, and DAVID LEONEL GARZA,

Plaintiffs-Appellants,

vs.

SPUDNIK EQUIPMENT COMPANY, et. al.,

Defendants-Appellees.

No. 80-3110
D.C.
No. 4-76-21
MEMO-
RANDUM

Argued and Submitted — September 9, 1981

Decided — November 27, 1981

Appeal from the United States District Court
for the District of Idaho
Marion J. Callister, District Judge, Presiding

Before: PREGERSON and CANBY, Circuit Judges, and KELLAM,* District Judge.

Appellants, citizens and residents of Texas, and heirs of Miguel Garza, brought this wrongful death action based on strict liability in tort against the Idaho manufacturer of a potato piler that overturned and crushed the decedent Garza. Appellants contend that the potato piler, as originally sold, was unreasonably dangerous because the manufacturer, Spudnik Equipment Company (Spudnik), failed to warn users that the equipment could, under certain circumstances, overturn if operated without stabilizing outriggers. The parties agree that Texas law governs this diversity suit filed in federal court under 28 U.S.C. §1332. The district court, after

*Honorable Richard B. Kellam, Senior United States District Judge, Eastern District of Virginia, sitting by designation.

a bench trial, entered judgment in favor of Spudnik. The court ruled that Spudnik had "no duty to warn against operation of the piler without outriggers" and that even if such a duty existed, the evidence was insufficient to establish that "the failure to warn was the producing cause of Miguel Garza's death." Appellate jurisdiction is based on 28 U.S.C. § 1291. We reverse.

FACTS

On April 28, 1974, Miguel Garza suffered a fatal injury when a Spudnik Model 400 "swing boom potato piler" tipped over and crushed him. The accident occurred on the premises of Garza's employer, Vahlsing Inc., in Hildalgo County, Texas. The piler has a conveyor-belt that travels on a 30-foot boom. The boom can be pivoted by using a handcrank. According to eyewitness testimony, Garza, while standing at the side of the piler's chassis, was swinging the boom around to load potatoes onto a truck. As the boom swung out, the wheels affixed to the piler's chassis lifted off the ground, and the equipment toppled onto Garza. An expert witness called by Spudnik testified on cross-examination that the mishap would not have occurred had the piler been operated with outriggers.

The piler, when originally sold to a Denver company in 1969, was equipped with stabilizing outriggers fastened to the chassis by use of a "double nut system. The outriggers could be raised to move the piler and could also be removed to transport several pilers by truck. When Vahlsing purchased the piler in late 1972 or early 1973, the outriggers had been removed. Neither Spudnik's sales literature nor the piler's operating manual contained any warning that the piler could overturn without outriggers, and no notice of this danger appeared on the machine itself.

DISCUSSION

Texas has adopted the rule of strict liability in tort set forth

in Restatement (Second) of Torts § 402A. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1087 (5th Cir. 1973). A manufacturer or supplier who places a defective product, i.e., an unreasonably dangerous product, into the stream of commerce is strictly liable in tort if a user or consumer sustains injuries as a result of that defect. *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1272 (5th Cir. 1974); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 (Tex. 1977); *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602, 604 (Tex. 1972); *Ethicon Inc. v. Parten*, 520 S.W.2d 527, 532 (Tex.Civ.App. 1975).

We must first determine whether Spudnik had a duty to warn users of the piler that it could overturn if operated without outriggers. Under Texas law there are three categories of product defects, any one of which, if proved, can be grounds for holding a manufacturer strictly liable in tort. A product may be rendered defective by a defect in manufacture, a defect in design, or a failure to warn of a dangerous product characteristic. *Ethicon Inc. v. Parten*, 520 S.W.2d at 532. If a manufacturer knows or should know that a product's characteristics create an unreasonable risk of harm to a user or consumer, then the manufacturer is under a duty to give adequate warning of such danger. *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978); *Crocker v. Winthrop Laboratories*, 514 S.W.2d 429, 433 (Tex. 1974); *Lopez v. Aro Corp.*, 584 S.W.2d 333, 335 (Tex. Civ. App. 1979).

Because of the danger posed by the inherent instability of a piler with a 30-foot boom, Spudnik's president, the designer of the piler, included outriggers in the design and manufacture of the equipment. As stated above, the outriggers were designed to be removable to facilitate transporting several pilers by truck. But without adequate warning that the outriggers are an essential safety mechanism, they might, after removal, be misplaced or simply laid aside as an unnecessary accessory. Thus we conclude that it was reasonably foreseeable that the piler would be operated without outriggers and since such a use was reasonably foreseeable, we conclude that under Texas law, Spudnik had a duty to warn of this dangerous characteristic.

Before a manufacturer can be held strictly liable in tort, it must also be shown that the product's defect, here the failure to give an adequate warning, was the producing cause[1] of the user's injury. *Reyes v. Wyeth Laboratories*, 498 F.2d at 1280, 1281; *General Motors Corp. v. Hopkins*, 548 S.W.2d at 351; *Ethicon v. Parten*, 520 S.W.2d at 532, 533. Where use of a defective product results in the user's death, testimony as to whether the user would have read a warning is speculative at best. Under Texas law, however, there is a rebuttable presumption that if an adequate warning had been given, a user "would have read any warning provided by the manufacturer, and acted so as to minimize the risks." *Reyes v. Wyeth*, 498 F.2d at 1281.

Spudnik offered no evidence to rebut that presumption. The evidence shows that Garza was of above-average intelligence and suffered from no condition that would have interfered with his ability either to read a warning or to act on it. Thus the evidence clearly establishes that had a warning against operation of the piler without outriggers been placed on the machine itself, Garza would have read and heeded such a warning and used outriggers at the time of the accident, thereby avoiding injury. We therefore conclude that the district court's finding that the evidence is insufficient to establish that a warning would have reached decedent Garza or prevented the accident in question is clearly erroneous.

In summary, we conclude that under the rule of strict liability in tort as applied in Texas, Spudnik had a duty to warn against use of the piler without outriggers. Because an adequate warning would have prevented the accident, we further conclude that the failure to warn was the producing cause of decedent Garza's death. REVERSED and REMANDED for determination of damages.

---

[1]Under Texas law, producing cause has been defined as "an efficient, exciting or contributory cause, which, in a natural and continuous sequence, caused in whole or in part the occurrence or injuries, if any, in question, and but for said cause the occurrence or injuries would not have occurred." *General Motors Corp. v. Hopkins*, 535 S.W.2d 880, 887 (Tex.Civ.App. 1976).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

U.S. DISTRICT COURT
DISTRICT OF IDAHO
Filed at.....M

FEB 1 - 1980

JERRY L. CLAPP, Clerk

By _____Deputy

SIXTA GARZA, individually, as Representative of the Estate of MIGUEL G. GARZA, Deceased; ISRAEL GARZA, ESMERALDA GARZA GALLARDO, ISMAEL GARZA, DAVID LEONEL GARZA,

Plaintiffs,

-vs-

SPUDNIK EQUIPMENT COMPANY and SPUDNIK POTATO EQUIPMENT COMPANY,

Defendants.

Civil No. 4-76-21

JUDGMENT

This matter was heard by the Court, sitting without a jury, on January 7 through January 9, 1980. Evidence was received, argument had, and the case submitted. The Court has heretofore entered formal Findings of Fact and Conclusins of Law favorable to the defendant.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that judgment shall be, and the same is hereby, entered in favor of the defendant and against the palintiffs. Neither party shall recover costs.

DATED this _____ day of January, 1980.

_____

MARION J. CALLISTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SIXTA GARZA, Individually, as Representative of the Estate of MIGUEL G. GARZA, Deceased; ISRAEL GARZA, ESMERALDA GARZA GALLARDO, ISMAEL GARZA, DAVID LEONEL GARZA,

Plaintiffs,

-vs-

SPUDNIK EQUIPMENT COMPANY SPUDNIK POTATO EQUIPMENT COMPANY,

Defendants.

U.S. DISTRICT COURT
DISTRICT OF IDAHO
Filed at.....M
FEB 1 - 1980
JERRY L. CLAPP, Clerk
By _____Deputy

Civil No. 4-76-21

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter came on for trial before the Court at Boise in this District on January 7, 1980, and continued through January 9, 1980. The Court, having heard the evidence and the arguments of counsel, and the matter having been finally submitted, the Court does hereby find the facts and state separately its conclusions of law thereon, and directs the entry of the appropriate judgment as follows:

FINDINGS OF FACT

1. The plaintiffs are citizens and residents of Hidalgo County, Texas.

2. The defendant Spudnik Equipment Company is a corporation organized and existing under the laws of the State of Idaho, with its principal place of business at Pocatello, Idaho.

3. That the matter in controversy as to each plaintiff exceeds $10,000.00, exclusive of interest and costs.

4. That the decedent, Miguel Garza, was born on September 11, 1927.

5. That Miguel Garza was married to Sixta Garza on August 26, 1950, in Elsa, Texas.

6. That Miguel Garza and Sixta Garza had four children, only one of whom was a minor (Israel Garza) at the time of Miguel Garza's death. The birth date of Israel Garza is June 18, 1956.

7. That Miguel Garza was killed on April 28, 1974, in Hidalgo County, Texas, when a potato piler he was operating overturned on top of him.

8. That at the time of his death, Miguel Garza was operating a Spudnik Swing Boom Piler, Model 400, Serial No. 354, manufactured by Spudnik Equipment Company of Blackfoot, Idaho, without any outriggers attached.

9. That decedent's employer in Hidalgo County, Texas, was Vahlsing, Inc.

10. That on or about November 26, 1969, Spudnik Equipment Company sold to R Squared Company, f.o.b. Blackfoot, Idaho, the potato piler involved in this action. That said sale occurred in the ordinary course of business of Spudnik Equipment Company.

11. That the potato piler was sold for use in stacking potatoes in storage.

12. That there is no evidence in the record, nor was any produced at trial, showing how many times or under what circumstances ownership of the potato piler changed hands after it was purchased by R Squared Company and before it was purchased by Vahlsing, Inc.

13. That Swing Boom Piler, Model 400, Serial No. 354, was sold with outriggers attached, as were all potato pilers having a boom length of over twenty-four feet.

14. That the outriggers were fastened to three pad eyes welded onto the potato piler by use of a double nut system. The outriggers could be raised to move or "trail" the piler. The outriggers could also be removed to transport several pilers by truck.

15. That at the time the machine was placed in commerce, that potato piler, Serial No. 354, Model 400 was not unreasonably dangerous to life or limb as constructed with outriggers attached when used for the purpose for which it was built or for any use that could reasonably be anticipated by the defendant.

16. That the potato piler was altered and modified after it had left the control of the defendant. The outriggers had been removed and the speed of the conveyor belt had been slowed down by substituting a 48-tooth sprocket for the original 24-tooth sprocket. As a result, the load on an operating boom could be twice that anticipated by the manufacturer.

17. That the defendant did not foresee and could not be expected to have foreseen that the outriggers would have been permanently removed or that the machine would be operated without outriggers. Purchasers of potato pilers could be expected to understand the operation of such machines and the advisability of retaining the outriggers.

18. That the decedent, Miguel Garza, was a person of above-average intelligence who had worked for several years in the handling of farm products. That Mr. Garza was an experienced "line foreman" who had supervised groups of up to 120 workers. Mr. Garza had been a night foreman at the Vahlsing plant and had occasion to see the potato piler in operation, without outriggers.

19. That someone who had operated a Spudnik Swing Boom Piler Model 400, or had seen such a machine in operation, would be aware that rotation of the boom without attached outriggers would create some tipping action and that, absent cautious operation of the machine, such tipping action could conceivably result in the overturning of the machine.

20. That the evidence is insufficient to determine by a preponderance of the evidence how the accident happened or the actual cause of the accident.

21. That the evidence is insufficient to establish by a preponderance of the evidence that in 1969, when the potato piler in question was built and sold, that the knowledge of the trade or the manner of the construction of the machine was such as to require any warning to be given pertaining to the use of the machine without outriggers.

.22. That the evidence is insufficient to establish by a preponderance of the evidence that, had the defendant given any warning to the original purchaser of the machine, such warning would have been passed to the decedent, or his employer or have prevented the accident in question.

CONCLUSIONS OF LAW

1. This Court has proper jurisdiction of the subject matter and the parties by virtue of 28 U.S.C. § 1332.

2. The potato piler in question was not unreasonably dangerous or defective by reason of its design at the time it was placed in commerce.

3. Since the potato piler was not unreasonably dangerous, the defendant was under no duty to warn against operation of the piler without outriggers. The lack of warning did not subject the users to an unreasonable risk of harm.

4. Even if defendant had been under a duty to warn against operation of the piler without the outriggers, the evidence was insufficient to establish that an adequate warning given would have reached Vahlsing, Inc., or decedent, or that the failure to warn was the producing cause of Miguel Garza's death. **Technical Chemical Co. v. Jacobs**, 480 S.W. 2d 602 (Tex. 1972).

5. The plaintiffs have failed to establish by a preponderance of the evidence any right to recover against the defendant.

Accordingly, judgment should be entered against the plaintiffs and in favor of the defendant. Each party is to bear its own costs.

DATED this _____ day of January, 1980.

MARION J. CALLISTER
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SIXTA GARZA, Individually, as Representative of the Estate of MIGUEL G. GARZA, Deceased; ISRAEL GARZA, ESMERALDA GARZA GALLARDO, ISMAEL GARZA, DAVID LEONEL GARZA,

Plaintiffs,

-vs-

SPUDNIK EQUIPMENT COMPANY and SPUDNIK POTATO EQUIPMENT COMPANY,

Defendants.

U.S. DISTRICT COURT
DISTRICT OF IDAHO
Filed at.....M
FEB 27 - 1980
JERRY L. CLAPP, Clerk
By _____Deputy

Civil No. 4-76-21
ORDER

Plaintiffs having moved to amend Findings of Fact and Conclusions of Law and enter judgment for the plaintiffs, and the Court having considered the same;

NOW, THERFORE, IT IS ORDERED that the Findings of Fact be amended as follows:

Finding of Fact No. 10 shall be modified to add at the end thereof that: "R Squared Company was known by defendant to be engaged in the sale of farm machinery."

Finding of Fact No. 13 shall read as follows: "That Swing Boom Piler, Model 400, Serial No. 354, was initially sold with outriggers attached, as were all potato pilers having a boom length of over twenty-four feet. The outriggers were attached to give additional stability and safety to the machine."

IT IS FURTHER ORDERED that in all other respects, the motion is denied.

DATED this _____ day of February, 1980.

_____
MARION J. CALLISTER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

SIXTA GARZA, Individually, as Representative of the Estate of MIGUEL G. GARZA, Deceased; ISRAEL GARZA, ESMERALDA GARZA GALLARDO, ISMAEL GARZA, and DAVID LEONEL GARZA,

80-3110
No. _____
DC CV 4-76-21 MJC

Plaintiffs-Appellants,

-vs-

SPUDNIK EQUIPMENT COMPANY, et al.,

Defendants-Appellees.

APPEAL from the United States District Court for the __ District of IDAHO (Pocatello)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ _____ District of IDAHO (Pocatello)

_____ and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered November 27, 1981

A TRUE COPY
ATTEST
JAN 20 1982
Clerk of Court
by: Oscar (illegible)
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIXTA GARZA, Individually, as Representative of the Estate of MIGUEL G. GARZA, Deceased; ISRAEL GARZA, ESMERALDA GARZA GALLARDO, ISMAEL GARZA, and DAVIDE LEONEL GARZA,

Plaintiffs-Appellants,

-vs-

SPUDNIK EQUIPMENT COMPANY, et al.,

Defendant-Appellee.

FILED
JAN 06 1982
Clerk U.S. COURT OF APPEALS

No. 80-3110

ORDER

Before: PREGERSON and CANBY, Circuit Judges, and KELLAM,* District Judge

Appelants' petition for rehearing is denied.

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* Honorable Richard B. Kellam, Senior United States District Judge, Eastern District of Virginia, sitting by designation.